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Towards an Account of Linguistic Equality

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Towards an Account of Linguistic Equality

Abstract

The Canadian Charter of Rights and Freedoms contains not one but two kinds of equality rights—general equality rights, set out in section 15, and linguistic equality rights, set out in sections 16 to 23—but the relationship between them is not well understood. Do official language rights rest on a distinct set of values, or do they simply instantiate the same general principle expressed in section 15? If the former, what are these values, and how do they relate to other principles of constitutional justice? The matter is further complicated by the need to account for the special constitutional status of Indigenous peoples, who also claim a form of equality. If we are to do justice to all concerned, we need to determine if and how these different claims to equality can and should fit together. However, this requires that we have a clear account of their underlying principles, and our understanding of linguistic equality in this respect lags far behind. While the concept of general equality and the status of Indigenous peoples have both received sustained theoretical attention, linguistic equality has not, leaving a number of fundamental questions—namely its basic analytical structure and its moral foundations—unresolved. The purpose of this article is to lay the groundwork for a theoretical account of linguistic equality, one that situates this concept within a broader framework of constitutional values that includes general equality rights and the rights of Indigenous peoples.

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Towards an Account of Linguistic Equality

ÉRIK LABELLE EASTAUGH*

The *Canadian Charter of Rights and Freedoms* contains not one but two kinds of equality rights—general equality rights, set out in section 15, and linguistic equality rights, set out in sections 16 to 23—but the relationship between them is not well understood. Do official language rights rest on a distinct set of values, or do they simply instantiate the same general principle expressed in section 15? If the former, what are these values, and how do they relate to other principles of constitutional justice? The matter is further complicated by the need to account for the special constitutional status of Indigenous peoples, who also claim a form of equality. If we are to do justice to all concerned, we need to determine if and how these different claims to equality can and should fit together. However, this requires that we have a clear account of their underlying principles, and our understanding of linguistic equality in this respect lags far behind. While the concept of general equality and the status of Indigenous peoples have both received sustained theoretical attention, linguistic equality has not, leaving a number of fundamental questions—namely its basic analytical structure and its moral foundations—unresolved. The purpose of this article is to lay the groundwork for a theoretical account of linguistic equality, one that situates this concept within a broader framework of constitutional values that includes general equality rights and the rights of Indigenous peoples.

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The *Canadian Charter of Rights and Freedoms* (*Charter*) contains not one but two kinds of equality rights—general equality rights, set out in section 15, and linguistic equality rights, set out in sections 16 to 23. Together, they account for a substantial proportion of the *Charter's* operative provisions.¹ Nevertheless, and despite the obvious connection between them, the relationship between these two sets of rights is not well understood. Thus far, the courts have tended to view them as analytically distinct, given that linguistic equality rights apply only to two languages, English and French, while general equality rights are universal. As a result, section 15 cannot be used to expand the scope of the *Charter's* language

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1. *Canadian Charter of Rights and Freedoms*, ss 15, 16-23, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. In total, 8 of 21 rights-conferring sections of the *Charter* pertain to some form of equality. However, given that some sections set out several distinct rights, the total proportion of equality rights varies depending on how one performs the calculation. By my count, the *Charter* comprises 41 rights-granting *provisions*, of which 15 pertain to some form of equality right: (square brackets indicate the number of rights/provisions) sections 2(a)-(d) [4], section 3 [1], sections 4(1) & (2) [2], section 5 [1], section 6(1) & (2)(a)-(b) [3], section 7-9 [3], section 10(a)-(c) [3], section 11(a)-(i) [9], section 12-14 [3], section 15(1) [1], sections 16(1) & (2) [2], section 16.1(1) [1], sections 17(1) & (2) [2], sections 18(1) & (2) [2], sections 19(1) & (2) [2], sections 20(1) & (2) [2], sections 23(3)(a)-(b) [2], and section 28 [1].

rights.² But the courts have ventured little beyond this rule, and the general implications of the underlying distinction are unclear. Do official language rights rest on a distinct set of values, or do they simply represent a particular instantiation of the same general principle expressed in section 15? If the former, what are these values, how do they relate to the broader framework of the constitution, and what do they tell us about whether its current arrangements are just?

Answering these questions is difficult because it requires some account of how Canada's cultural and constitutional landscapes are enmeshed, which is no simple task. Official language groups are not the only cultural groups to enjoy constitutional recognition. Indigenous cultures, for instance, have a special constitutional status,³ and the growing movement to protect them, exemplified by the recently enacted *Indigenous Languages Act*,⁴ is premised in part on a claim to equality. But the relationship between this claim and that of official language groups is unclear.⁵ While there are some obvious parallels between the goal of political and social reconciliation with Indigenous peoples, on the one hand, and the Charter's system of language rights—which was adopted in response to the long history of injustice towards French Canadians—on the other, there is also a degree of tension between these two projects, given that the Constitution currently elevates English and French above all other languages.⁶ This tension in

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2. See e.g. *Mahe v Alberta*, [1990] 1 SCR 342 [*Mahe*]; *Lalonde v Ontario (Commission de restructuration des services de santé)*, 208 DLR (4th) 577 (Ont CA) [*Lalonde*]. See also Warren Newman, "Understanding Language Rights, Equality and the *Charter*: Towards a Comprehensive Theory of Constitutional Interpretation" (2004) 15 Nat'l Inst Just J 363 at 370 [Newman, "Understanding Language Rights, Equality and the *Charter*"].
 3. Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (University of Toronto Press, 2001) at 12-16.
 4. SC 2019, c 23.
 5. See e.g. Truth and Reconciliation Commission of Canada, "Calls to Action" in *Canada's Residential Schools: Reconciliation: The Final Report of the Truth and Reconciliation Commission of Canada*, vol 6 (McGill-Queen's University Press, 2015) 223 at 225-26.
 6. For example, consider the controversy surrounding proposals to impose French-English bilingualism as a requirement for nomination to the Supreme Court of Canada. Supporters argue that this is necessary in order to respect the legal equality of the two languages, while many detractors argue (plausibly though not entirely convincingly) that this would make it impossible to nominate an Indigenous person to the Court, since members of Canada's Indigenous peoples are rarely French-English bilingual. See e.g. Maxime St-Hilaire et al, "L'opposition au bilinguisme obligatoire des juges de la Cour suprême est indéfendable et induit sa propre forme de colonialisme," *Policy Options Politiques* (18 Décembre 2017), online: <www.policyoptions.irpp.org/fr/magazines/december-2017/le-faux-debat-entre-autochtones-et-francophones-au-sujet-des-juges-de-la-csc> [perma.cc/X7M4-KYC8]. See also *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2013 SCC 42 (Factum of the Intervenor Assembly of Manitoba Chiefs at 1, 9).

fact dovetails with what some contend is a fundamental inconsistency between Canada's language rights system and its commitment to general equality and multiculturalism, which would appear to oppose the special distinction afforded to English and French.⁷ Any satisfactory answer to the questions outlined above must ultimately address these apparently, and perhaps genuinely, inconsistent claims of equality.

Thus, if we are to do justice to all concerned, we need to determine if and how these different claims to equality can and should fit together. However, this project requires that we have a clear account of their underlying principles. Unfortunately, our understanding of linguistic equality in this respect lags far behind, for while the concept of general equality and the status of Indigenous peoples have both received sustained theoretical attention, linguistic equality has not. Although the official language rights system was the focus of considerable theoretical attention in the late 1980s and 1990s, this work was conducted before linguistic equality came to occupy the central organizing role it plays today.⁸ The primary focus of these early efforts was the "political compromise doctrine," a theory adopted by the Supreme Court of Canada (SCC) in the late 1980s.⁹ According to this theory, language rights lack any principled foundation and ought to be interpreted restrictively. In this view, language rights are "peculiar to Canada" and "lack the universality, generality and fluidity of basic rights."¹⁰ Thus, unlike other *Charter* rights, such as the right to security of the person, language rights are not "seminal in nature,"¹¹ meaning that they should be interpreted both narrowly and statically.¹² This approach was heavily criticized in scholarly

7. Peter H Russell, *Canada's Odyssey: A Country Based on Incomplete Conquests* (University of Toronto Press, 2017) at 306. For a critical take on the official languages framework, see also Eve Haque, *Multiculturalism within a Bilingual Framework: Language, Race, and Belonging in Canada* (University of Toronto Press, 2012).

8. For a more detailed account of this role, see Part IV, below.

9. *MacDonald v City of Montreal*, [1986] 1 SCR 460 [*MacDonald*]; *Société des Acadiens du Nouveau-Brunswick Inc v Association of Parents for Fairness in Education*, [1986] 1 SCR 549 [*Société des Acadiens*]; *Bilodeau v Manitoba (AG)*, [1986] 1 SCR 449 [*Bilodeau*]; *R v Mercure*, [1988] 1 SCR 234 [*Mercure*]. These cases dealt with language use in a judicial context under section 133 of the *Constitution Act, 1867*, section 23 of the *Manitoba Act, 1870*, section 19(2) of the *Charter*, and section 110 of the *North-West Territories Act*. Each of these provisions have similar wording and the SCC chose to interpret them all in the same manner.

10. *MacDonald*, *supra* note 9 at 500.

11. *Société des Acadiens*, *supra* note 9 at 578.

12. *Ibid* at 580.

literature.¹³ Scholars seized on the opportunity to further explore some basic theoretical questions.¹⁴ However, linguistic equality, as such, was not the focus of these efforts, which were mainly preoccupied with the contention that language rights are simply unprincipled artifacts of political horse trading.¹⁵ It was not until the landmark case of *R v Beaulac* in 1999, when the SCC finally rejected the political compromise doctrine, that the principle of equality was placed squarely at the centre of language rights law.¹⁶

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13. See e.g. Pierre Foucher, "L'interprétation des droits linguistiques constitutionnels par la Cour suprême du Canada" (1987) 19 Ottawa L Rev 381; Leslie Green, "Are Language Rights Fundamental?" (1987) 25 Osgoode Hall LJ 639; Leslie Green & Denise Réaume, "Second-Class Rights—Principle and Compromise in the Charter" (1990) 13 Dal LJ 564 [Green & Réaume, "Second-Class Rights"]; Denise Réaume & Leslie Green, "Education and Linguistic Security in the Charter" (1988) 34 McGill LJ 777 [Réaume & Green, "Education and Linguistic Security"]; Alan Riddell, "À la recherche du temps perdu: la Cour suprême et l'interprétation des droits linguistiques constitutionnels dans les années 80" (1988) 29 C de D 829.
 14. Réaume & Green, "Education and Linguistic Security," *supra* note 13; Denise Réaume, "Individuals, Groups, and Rights to Public Goods" (1988) 38 UTLJ 1; Denise Réaume, "The Group Right to Linguistic Security: Whose Right, What Duties?" in Judith Baker, ed, *Group Rights* (University of Toronto Press, 1994); Denise G Réaume, "Justice between Cultures: Autonomy and the Protection of Cultural Affiliation" (1995) 29 UBC L Rev 117; Denise Réaume, "The Constitutional Protection of Language: Survival or Security?," David Schneiderman, ed, *Language and the State: The Law and Politics of Identity/Langue et état: droit, politique et identité* (Yvon Blais, 1989) [Réaume, "The Constitutional Protection of Language"]; Denise G Réaume, "Official-Language Rights: Intrinsic Value and the Protection of Difference" in Will Kymlicka & Wayne Norman, eds, *Citizenship in diverse societies [electronic resource]* (Oxford University Press, 2000); Denise Réaume, "Language Rights: Constitutional Misfits or Real Rights" in André Braën, Pierre Foucher, & Yves Le Bouthillier, eds, *Languages, Constitutionalism and Minorities/Langues, constitutionnalisme et minorité* (LexisNexis Butterworths, 2006); Linda Cardinal, "Langue, droit et politique: la théorie libérale et le débat sur les langues minoritaires" in André Braën, Pierre Foucher, & Yves Le Bouthillier, eds, *Languages, Constitutionalism and Minorities/Langues, constitutionnalisme et minorité* (LexisNexis Butterworths, 2006); Alan Patten, "Who Should Have Official Language Rights?" in André Braën, Pierre Foucher, & Yves Le Bouthillier, eds, *Languages, Constitutionalism and Minorities/Langues, constitutionnalisme et minorité* (LexisNexis Butterworths, 2006); Pierre Foucher, "Nations francophones et Constitution canadienne" (2010) 30 Francophonies d'Amérique 89.
 15. That being said, they may ultimately have some bearing on it. For instance, the account developed by Green and Réaume, which centers on "linguistic security," can be seen as an argument that language rights ought to be viewed as protecting an interest in *equality of linguistic security*. See Réaume, "The Constitutional Protection of Language," *supra* note 14; Green, *supra* note 13; Green & Réaume, "Second-Class Rights," *supra* note 13.
 16. [1999] 1 SCR 768 [*Beaulac*].

While *Beaulac's* rejection of the political compromise doctrine was a welcome development, the new paradigm it launched remains under-theorized. The case law has done little to clarify the principle of linguistic equality, and theoretical analyses of language rights based in a legal perspective have become increasingly rare¹⁷ (although the literature in normative political theory on the topic continues to grow).¹⁸ This leaves a number of fundamental questions about the principle

17. As Doucet has noted, legal scholarship on language rights has shied away from questions of theory. Michel Doucet, "Pourquoi une langue mérite-t-elle une protection constitutionnelle ou législative?" (2009) 11 RCLF 55 at 55 [Doucet, "Langue mérite-t-elle une protection?"]. Few scholarly texts have explored the concept of linguistic equality at any length, and they typically limit themselves to a description and analysis of judicial statements on the topic and propose little in the way of a broader explanatory framework. See *e.g.* Warren J Newman, "La progression vers l'égalité des droits linguistiques par voie législative et judiciaire" (2004) 6 RCLF 19 [Newman, "La progression vers l'égalité des droits linguistiques"]. Newman, "Understanding Language Rights, Equality and the *Charter*," *supra* note 2; Joseph Eliot Magnet, *Modern Constitutionalism: Identity, Equality and Democracy* (LexisNexis Butterworths, 2004) [Magnet, *Modern Constitutionalism*]; Joseph Eliot Magnet, "Equality between Linguistic Communities in Canada" in André Braën, Pierre Foucher & Yves Le Bouthillier, eds, *Languages, Constitutionalism and Minorities/Langues, constitutionnalisme et minorité* (LexisNexis Butterworths, 2006) [Magnet, "Equality between Linguistic Communities in Canada"]; François Boileau, "L'égalité réelle du français et de l'anglais via le développement des communautés" in André Braën, Pierre Foucher & Yves Le Bouthillier, eds, *Languages, constitutionalism and minorities/Langues, constitutionnalisme et minorité* (LexisNexis Butterworths, 2006); Vanessa Gruben, "Language Rights in Canada: A Theoretical Approach" in Joseph Eliot Magnet, ed, *Official Languages of Canada: New Essays* (LexisNexis Canada, 2008); Joseph Eliot Magnet & Mark Power, "Institutional Reform: Maintenance Claims and Equality for Canada's Official-Language Minorities" in Joseph Eliot Magnet, ed, *Official Languages of Canada: New Essays* (LexisNexis Canada, 2008); Michel Bastarache, "Le principe d'égalité des langues officielles" in Michel Bastarache, ed, *Les droits linguistiques au Canada, 3ième édition* (Yvon Blais, 2013) at ch 2. Some authors have attempted to connect linguistic equality to a structural account of the Constitution, but without venturing to say much about the content of equality as a concept. See Pierre Foucher, "La double dualité du Canada et ses conséquences juridiques" in Pierre Thibault et al, eds, *Les mélanges Gérard-A Beaudoin: Les défis du constitutionnalisme* (Yvon Blais, 2002), ch 4. A notable exception to this general trend would be Sébastien Grammond, who has sought to assess the compatibility of section 23 rights with principles of general equality with respect to the question of group membership control. See Sébastien Grammond, *Identity Captured by Law: Membership in Canada's Indigenous Peoples and Linguistic Minorities* (McGill-Queen's Press, 2009) at 150-88.
18. Although sometimes examined as a standalone topic, language rights are also a recurring theme in the literature dealing with multiculturalism, diversity, and national minorities, which is too vast to list here. See *e.g.* Will Kymlicka & Alan Patten, eds, *Language Rights and Political Theory*, vol 23 (Oxford University Press, 2003). For an excellent recent overview of these topics with a particular relevance to language rights, see Allen Patten, *Equal Recognition: The Moral Foundations of Minority Rights* (Princeton University Press, 2014).

of linguistic equality—namely its basic analytical structure and its moral foundations—unresolved. Amongst other things, it is difficult to determine how linguistic equality should influence the content of any given language right. This problem is most acutely felt in the context of a) provisions having a very general character (such as section 16 of the *Charter*), where the concept of linguistic equality could and should provide some much-needed scaffolding; b) provisions that are somewhat more detailed but have received little or no attention from the courts (such as section 20 of the *Charter* and Part V of the *Official Languages Act*¹⁹ (OLA)) and thus still contain a large number of unresolved ambiguities; and c) provisions, like section 16.1 of the *Charter* and Part VII of the OLA,²⁰ that are both very general *and* have received little judicial attention. What's more, the lack of clarity surrounding these more specific issues makes it difficult to establish how linguistic equality relates to other strands of equality found in Canadian constitutional law, or to determine the extent of conflict or common ground between the principles underpinning these rights-granting provisions.

I. AIMS AND METHODOLOGY

What we need, in short, is a theoretical account of linguistic equality; one that situates this concept within a broader framework of constitutional values that includes general equality rights and the rights of Indigenous peoples. However, developing such an account will be a substantial undertaking and beyond the scope of a single article. The aim of this article is thus to lay the groundwork for such an account by outlining some of the main methodological and conceptual challenges and to sketch out solutions to a limited number of them. My hope is that this effort will make systematic progress easier to achieve going forward.

Because linguistic equality is a legal concept, the account I envision is one that aims to offer a *legal* theory of it—that is, one which explains or constructs its meaning from within the parameters of legal discourse, following a broadly “internal” perspective.²¹ Doing this requires that the “patterns of normative understanding” already present in the law, which enable us to see it as a “working whole,” be excavated and clarified.²² Even if one's ambition is to further develop

19. *Official Languages Act*, RSC 1985, c 31 (4th Supp).

20. *Ibid.*

21. Richard A Posner, “Legal Scholarship Today” (2002) 115 Harv L Rev 1314 at 1315; Christopher McCrudden, “Legal Research and the Social Sciences” (2006) 122 Law Q Rev 632 at 633.

22. McCrudden, *supra* note 19 at 634.

the law in areas where it is underdetermined, understanding these patterns is critical, for they impose a number of “fixed points” that define or at least constrain the scope of the legally possible.²³ Nevertheless, the concepts set out in the primary legal sources do not exhaust the range of relevant considerations. Like other *Charter* rights, official language rights were enacted in furtherance of some moral purpose, and so their “philosophic context”²⁴—the broader set of extra-legal moral concepts that shape our understanding of them²⁵—must be taken into account. A complete account of linguistic equality as a *legal* concept must therefore endeavour to make sense of the *moral* intuitions reflected in the “patterns of normative understanding,” and provide a basis on which to fill any conceptual gaps where issues of fundamental importance are unresolved. It should, in other words, include an account of why linguistic equality, as a legal norm, is morally justified.

That being said, the precise manner in which principles of political morality can or should affect our definition of what the law requires is a complicated question. I will take no definite position on it here, preferring instead to focus on the first first challenge, namely, the development of a workable model of linguistic equality based on the “patterns of normative understanding” found in the primary legal sources. Making sense of the moral intuitions or concepts underlying these patterns requires that we first have a clear account of them, which we do not.²⁶ I have thus chosen to focus here on excavating the structure of linguistic equality as a legal norm and developing a workable conceptual model to describe it.

The following discussion is divided into six parts. Part I reviews some of the difficulties posed by equality as a concept in order to define the nature of the task ahead with greater clarity. In particular, I argue that the distinction between “formal” and “substantive” equality, widely used as the starting point for analyzing linguistic equality, is theoretically sterile and should be set aside in favour of a more nuanced approach centered on what I call the *axiomatic constraints of equality*. Part II then uses a selection of language rights cases to illustrate this. Part III briefly explains why it is possible to develop a unified theory of linguistic equality despite the wide variety of legal measures referred to using the rubric of “language rights” (which includes both statutory and

23. Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2002) at 2.

24. *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 344.

25. Nicholas Bamforth, *Discrimination Law: Theory and Context, Text and Materials* (Sweet & Maxwell, 2008) at 171.

26. McCrudden, *supra* note 19 at 634.

constitutional measures operating at both the federal and provincial/territorial levels), while Part IV outlines my account of the central conceptual structure that binds these norms together. More specifically, I argue that the principle of linguistic equality operates on two distinct but inter-connected levels. The first level, which I call *generic linguistic equality*, refers to general principles applicable to the entire language rights system. The second level, *special linguistic equality*, refers to more specific conceptions of equality tied to particular contexts (like education). Building on this, Part V argues that there are at least two principles of generic linguistic equality—(1) individual linguistic equality and (2) collective linguistic equality—and briefly describes each one. Part VI, by way of conclusion, ventures some preliminary observations on how the principle of linguistic equality, as outlined above, might be justified from a moral standpoint.

II. EQUALITY AS A CONCEPTUAL SCHEMA

Equality is a notoriously difficult concept to define. It is sometimes referred to as an “essentially contested” concept on the grounds that achieving a consensus on its meaning is effectively impossible.²⁷ This problem is not limited to philosophical debates but extends to legal discourse as well.²⁸ For example, Chief Justice McLachlin once noted that “[t]he language of equality is so open and general that it is difficult to assign it precise legal meaning.”²⁹ I therefore hope the reader will share (or at least forgive) my inclination to begin by setting out some of what I see as the basic features of equality as a concept. Both scholarly and judicial commentary on linguistic equality generally lack clarity in this regard,³⁰ and as I will explain below, this can hamper our understanding of what is truly at stake in many cases. By stripping equality down to its conceptual bones, I hope to more clearly define the nature of the task ahead, and thus make it easier to achieve systematic progress in developing a workable model of linguistic

27. Cass R Sunstein, “Incompletely Theorized Agreements” (1995) 108 Harv L Rev 1733 at 1739; WB Gallie, “Essentially Contested Concepts” (1955-56) 56 Proc Aristotelian Soc’y 167.

28. The SCC has noted that section 15 “is perhaps the *Charter*’s most conceptually difficult provision.” See *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at 507.

29. Beverly McLachlin, “Equality: The Most Difficult Right” (2001) 14 SCLR (2d) 17 at 17.

30. See e.g. Newman, “La progression vers l’égalité des droits linguistiques,” *supra* note 17; Newman, “Understanding Language Rights, Equality and the *Charter*,” *supra* note 2; Magnet, *Modern Constitutionalism*, *supra* note 17; Magnet, “Equality between Linguistic Communities in Canada,” *supra* note 17; Boileau, *supra* note 17; Gruben, *supra* note 17 at 108-22; Magnet & Power, *supra* note 17; Bastarache, *supra* note 17.

equality. However, in order to do so, it will be necessary to briefly rehearse some points which may already be familiar to those well-versed in the literature on general equality.

As a preliminary matter, it bears noting that, despite Chief Justice McLachlin's comment, equality is in fact—in one sense at least—a fairly straightforward concept. To say that one thing is equal to another is to say that it amounts to the same thing; that, to put it in mathematical terms, there is an identity between them, as when we write " $2 + 2 = 4$." Equality is thus a mode of comparison, the purpose of which is to assert or ascertain the presence or absence of sameness. This much at least is clear.

However, that mathematical example conceals a great deal of complexity, for it rests upon a prior understanding of what is being compared. The distinct nature of " $2 + 2$ " and " 4 " shows different sets of symbols that are clearly not identical in all respects—for instance, they have different shapes and a different number of components. Nevertheless, the relation is held to be true because the two sets of symbols are understood to have the same numerical values. These values are intuitively assumed to be the relevant property for the purposes of comparison because the expression " $2 + 2 = 4$ " is normally put forward as a proposition of arithmetic, the axioms of which dictate that equality is a matter of numerical values rather than visually discernible traits, such as shape. Without the interpretive matrix supplied by these axioms, the proposition would be meaningless.

Thus, to be intelligible, any statement asserting a relation of equality must set out—or rest on a prior commitment regarding—the properties of interest. In other words, equality is merely "a conceptual schema ... [whose] open variables must be filled out."³¹ And therein lies the true challenge. The issue is not what "equality" means, as such, but rather (a) who or what should be compared, and (b) in respect of which attribute. I draw attention to this point because the way in which we discuss equality can sometimes obscure that underlying reality. For example, it is common in legal discourse to distinguish between putatively different "types" of equality, as when we draw a contrast between "formal" and "substantive" equality. This gives the impression that equality can take on fundamentally different forms, some of which may be better than

31. Stefan Gosepath, "Equality" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* (Metaphysics Research Lab, 2011) online: <plato.stanford.edu/archives/spr2011/entries/equality> [perma.cc/YXY5-RDKR]. See also Michel Doucet, "Le concept de l'égalité dans l'arrêt *Lalonde et al c Commission de restructuration des services de santé*" (2002) 4 RCLF 273 at 277 [Doucet, "L'égalité dans *Lalonde et al c Commission*"].

others, as is particularly evident in the typical French translation for “substantive” equality, “*l’égalité réelle*,” which literally means “real” equality.³² But despite the popularity of this framing, it rests on a mirage.

Consider a standard version of this distinction. The term “formal” equality is often used to describe a principle requiring that the law have the same legal effects on all individuals (sometimes described as “equality of treatment”), which can be accomplished by prohibiting explicit distinctions based on some trait or set of traits (sex, religious background, national origin, et cetera), distinctions held to be morally odious. Formal equality is then contrasted with a rival principle, according to which the law must produce the same *practical* effects on all such groups. The argument in favour of this rival principle is grounded in the observation that the real-world situation of people can vary based on the protected characteristics at issue; meaning that a right to equality of legal effects is insufficient, since a facially neutral law can produce different practical outcomes for the protected groups. In such cases, “true” equality requires that one examine the benefits or costs of a legal measure from a broader perspective.³³

Now, notice that the distinction does not truly rest on a premise that there are different types of equality. Instead, it merely reflects the fact that the conceptual schema of equality can be populated in different ways. The question “equality of what?” has at least two answers: legal effects and practical effects. These answers give rise to at least two possible principles of equality. However, neither of these answers is inherently more or less appropriate as a response to the relevant “what,” as both can be a proper basis for comparison, depending on the circumstances. For example, when it was argued that denying women the right to vote violated the principle of equality, the “what” referred to the legal effects *stricto sensu* of the relevant laws, and equalizing these legal effects was precisely the point of the remediation measures being sought. By contrast, when it is argued that constructing a building without wheelchair access is discriminatory, the “what” of interest is not the legal entitlement held by those in wheelchairs, for they have precisely the same right to enter the building as any member of the public. Instead, the argument rests on the differential practical effects such a design would have on their ability to exercise that right and enjoy its benefits.

The underlying lesson here is that the formal–substantive dichotomy cannot tell us which effect to be concerned about in any given case, because it is a *description* and not an *explanation*. As a (rather crude) typology of equality principles, it outlines some of the ways in which one *could* define the scope of an

32. See generally *Beaulac*, *supra* note 16.

33. *Ibid* at para 22.

equality guarantee, but it does not contain within itself any reason for preferring one over the other. Any argument grounded directly in that dichotomy begs the very question at issue, namely, what value or interest does the equality guarantee seek to protect? Even in contexts where the formal–substantive dichotomy appears to do useful work, this is an illusion, for it does so merely as a vessel for other principles. An apt illustration of this can be found in a relatively recent article published in the *Osgoode Hall Law Journal*, in which Anthony Robert Sangiuliano argues against “formal” equality and in favour of “substantive” equality. The overarching argument is framed in terms of the formal–substantive dichotomy, and Sangiuliano purports to rest his analysis on the proposition that these concepts have differing internal structures, one of which is superior to the other as a framework for interpreting section 15 of the *Charter*.³⁴ In practice, however, neither formal nor substantive equality function as free-standing concepts in his account. In explicating each concept, Sangiuliano outlines a much broader set of normative assumptions that condition the equality analysis and serve as the true basis for the distinction drawn between the two “types” of equality.³⁵ That is, rather than defining “equality” in the abstract, Sangiuliano presents a theory of political morality according to which all individuals are entitled to equality of recognition, which he argues should be used as a basis for interpreting section 15.

To be clear, my aim here is not to criticize the substance of this account. I merely use it to illustrate that, as Denise Réaume has noted, “an equality claim does not directly appeal to equality itself as its foundation, but rather to some other value implicated in the distribution of the benefit in issue.”³⁶ Any particular guarantee of equality, linguistic or otherwise, will necessarily be parasitic upon a broader set of commitments. This broader set of commitments, like the axioms of arithmetic in the example above, supply the constraints needed to make the proposition fully intelligible. This is done by specifying the quality, the good,

34. “Substantive Equality as Equal Recognition: A New Theory of Section 15 of the *Charter*” (2015) 52 *Osgoode Hall LJ* 601 at 606–607.

35. For example, Sangiuliano associates “formal equality” with a conceptual framework resting on Dicey’s conception of “the rule of law,” and which rests (amongst other things) on the premise that individual autonomy is the paramount value in political morality. See *ibid* at 627. He also defines “substantive equality” as resting on a principle of equal recognition holding that the law must not reproduce social hierarchies between certain groups. See *ibid* at 609–10.

36. Denise Réaume, “Dignity, Equality, and Comparison” in Deborah Hellman & Sophia Moreau, eds, *Philosophical Foundations of Discrimination Law* (Oxford University Press, 2013) 9 [Réaume, “Dignity, Equality, and Comparison”].

or the social context in relation to which equality is to be measured:³⁷ what may be referred to as the “domain”³⁸ or the “space”³⁹ of equality.⁴⁰ For ease of reference, I shall henceforth refer to these as the *axiomatic constraints of equality*.

In a legal context, defining the axiomatic constraints of equality is, in the first instance at least, a matter of interpreting and applying the authoritative legal texts.⁴¹ Equality guarantees do not speak of “equality” writ large, but rather specify certain spheres of application. For example, section 15 of the *Charter* speaks of equality “before and under the law” as well as “equal protection and equal benefit of the law.”⁴² These terms set out, at least in part, the axiomatic constraints of that particular guarantee. Of course, despite the presence of such textual details, much of the necessary conceptual framework is missing or left up to interpretation (for example, what is a “benefit?”), meaning that a great deal of additional work is required before the guarantee can be applied to specific cases—and leaving ample room for disagreement. Nevertheless, it is a mistake to proceed as though the central issue to be resolved is the *structure* of equality as a concept.

III. THE DETERMINANT ROLE OF PURPOSE

Now, this might strike some as a distinction without a difference. Even under the formalistic definition of equality outlined above, one will always need to answer the question “equality of what?,” and accounts like the one I mentioned above clearly aim to provide an answer to that question. Is this simply a matter of terminology, and thus a mere “verbal controversy?”⁴³ I do not believe so. The binary choice described above unnecessarily constrains the debate and ultimately clouds the real issue. When the discussion is framed in these dichotomous terms, one is led to assume that there are only two competing accounts of the norm at

37. Cf William B Griffith, “Equality and Egalitarianism: Framing the Contemporary Debate” (1994) 7 Can JL & Jur 5 at 9; McLachlin, *supra* note 27 at 20.

38. Griffith, *supra* note 35 at 8.

39. Amartya Sen, *The Idea of Justice* (Belknap Press of Harvard University Press, 2009) at 292.

40. See Jennifer Koshan & Jonnette Watson Hamilton, “The Continual Reinvention of Section 15 of the Charter” (2013) 64 UNBLJ 19 at 22; *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 170 [*Andrews*] (both on the role of wording in defining the domain of section 15 equality rights).

41. In purely philosophical accounts, which are not subject to any authoritative sources, the axiomatic constraints of equality are typically supplied by the principles of some broader account of political morality.

42. *Supra* note 1, s 15.

43. Cf Glanville Williams, ed, *Salmond on Jurisprudence*, 11th ed (Sweet & Maxwell, 1957) at 264-65.

issue, when there may in reality be a much greater range of possibilities. This can hamper one's understanding of what is truly at stake in any given case.

Consider for example the SCC's decision in *DesRochers v Canada (Industry)*,⁴⁴ one of the leading cases on the definition of linguistic equality. At issue in this case was whether a community economic development program, the purpose of which was to fund local business ventures, had been implemented in a manner consistent with the federal government's duty to provide services of equal quality in both English and French. The crux of the problem was that, despite being able to communicate in French, Industry Canada's local third-party service provider had failed to develop a single project with a French-speaking business person.⁴⁵ According to the plaintiff, this was because the local service model was designed entirely by and for members of the linguistic majority and so did not account for significant sociocultural differences between the two communities, leading to a disconnect between the methods, needs, and interests of the francophone business community and the program offered by Industry Canada.⁴⁶ The plaintiff argued that the principle of equality undergirding section 20 of the *Charter* and Part IV of the *Official Languages Act* required Industry Canada to take these sociocultural differences into account, and thus to develop and fund a different

44. 2009 SCC 8 [*DesRochers* SCC].

45. In fact, the third-party provider retained by Industry Canada initially failed to offer even the most basic of services in French for it had no staff capable of communicating in that language. As a result, leading members of the local francophone community set up their own independently funded economic development agency, known as CALDECH. Eventually, having been made aware of its failure, Industry Canada agreed to fund CALDECH on an interim basis while it made changes to its program. However, these changes proved insufficient, and CALDECH's backers felt that Industry Canada's third-party provider remained insensitive to the needs of the francophone community. CALDECH therefore initiated proceedings under the *Charter* and the OLA, asking that Industry Canada be ordered to provide it with a stable revenue stream as the de facto service provider to the francophone population, and that it be compensated for services rendered during the years before Industry Canada had agreed to fund it on an interim basis. See *Desrochers v Canada (Industry)*, 2005 FC 987 [*Desrochers* FC].

46. *Ibid.* The plaintiffs' basic factual allegations, which were effectively accepted by Industry Canada, were as follows:

The French from the Huronia region are different than the English majority because, *inter alia*, they: (i) have less economic power in the region; (ii) have fewer jobs and a higher unemployment rate; (iii) have fewer institutions that are their own and are less likely to live in their mother tongue; (iv) are less likely to work in their mother tongue; (v) are subject to a rate of assimilation of more than 67%; (vi) live in a region where historically Francophones have been persecuted; and (vii) have a culture which is different. Accordingly, in terms of community economic development, the needs of the French in the Huronia region are different than those of their English peers (*ibid* at para 64).

(and administratively distinct) delivery model for the francophone community in the relevant region. The lower courts, siding with the government, ruled that the status quo did not constitute a violation of section 20 of the *Charter* because the latter guaranteed only “equal linguistic access to regional economic development services” and not “access to equal ... services.”⁴⁷

The lawyers for the plaintiff and for the Commissioner of Official Languages presented the issue as a clash between formal and substantive conceptions of linguistic equality.⁴⁸ This is understandable given that, on the facts of the case, doing so offered them a tactical advantage. The specific issue before the Court was whether the references to “language” in the relevant statutory and constitutional provisions were meant to denote English and French in their capacity as a means of communication, or instead referred to a broader set of factors or interests that would include the functional quality of the service at issue.⁴⁹ Thus, one could plausibly spin the key question as being whether to adopt a “broad” or a “narrow” interpretation of the right. In that context, the formal–substantive dichotomy can be a powerful ally, since formal equality is generically thought of as narrow, while substantive equality is instead broad or generous. Moreover, formal equality has acquired a fairly strong pejorative connotation,⁵⁰ especially in relation to language rights,⁵¹ and so the term can be used as a rhetorical device to push the courts or other decision makers towards the broadest available interpretation of a given right (*i.e.*, the one that views the right as protecting the broadest range of interests), particularly in novel cases where the interest being asserted has yet to be formally recognized, as was the case in *DesRochers*.

47. *Desrochers v Canada (Industry)*, 2006 FCA 374 at paras 33–34 [*Desrochers* FCA].

48. *Ibid* at para 36.

49. Érik Labelle Eastaugh, “The Concept of a Linguistic Community” (2018) 69 UTLJ 117 [Labelle Eastaugh, “The Concept of a Linguistic Community”]. As Érik Labelle Eastaugh has noted:

The reference to “language” in [language rights provisions] is ambiguous because language, as a phenomenon, has at least two major dimensions, each of which has different implications for the meaning [of such provisions]. On the one hand, a language is a code comprised of arbitrary symbols, whose purpose we might describe, after sociologist Pierre Bourdieu, as being to satisfy the “technical requirements of communication.” It is, in other words, a mechanism for recording and transmitting information. On the other hand, natural languages are a central feature of human society, arguably the most important one. In multilingual societies, they will often be a defining trait of the general social structure (*ibid* at 142).

50. For instance, in *Andrews*, Justice McIntyre compared it to the Nuremburg laws and the doctrine of “separate but equal” under which Jim Crow laws were upheld as constitutional in the United States. *Andrews*, *supra* note 38 at 166.

51. See generally *Beaulac*, *supra* note 16.

However, neither of the proposed interpretations in *DesRochers* was inherently “formal” or “substantive,” meaning that this distinction could not really settle the issue. The notion that “language” denotes that a means of communication may have been “narrow,” and thus “formal,” in the context of that case, but this is not always true. Consider, for example, the now notorious decisions of the SCC in the 1986 language rights trilogy (the Trilogy), in which the Court held that the right to use English or French in a courtroom guaranteed by section 133 of the *Constitution Act, 1867* (CA 1867), section 23 of the *Manitoba Act, 1870* (MA 1870), and section 19(2) of the *Charter* (all of which were held to be functionally equivalent and therefore requiring the same interpretation) does not carry with it a correlative right to be *understood* or *addressed* in that language by the court.⁵² This decision is often framed as a triumph of formalism over substance, and rightly so.⁵³ But for this very reason, it undercuts the formal–substantive framing used in *Beaulac*. In those cases, a reading based on the premise that both English and French must be of equal utility as a means of communication—like that proposed in dissent by Justice Wilson—would be “substantive” rather than “formal.” Thus, the notion that language rights protect the ability to communicate cannot simply be labelled as either formal or substantive, and whether it results in a broad or narrow reading of the right will depend entirely upon the context of the case at hand.⁵⁴

The larger lesson here is that the axiomatic constraints of equality can only be settled by defining the underlying purpose of the measure at issue; arguing that the matter can be settled by resorting to the formal–substantive dichotomy is mostly a distraction. The Trilogy gave rise to two rival interpretations of sections 133, 23, and 19(2) because two different purposes were proposed for these provisions, carrying with them different implications as to “what” needed to be equalized in order for the right to be respected. The majority’s view was that the

52. *MacDonald*, *supra* note 9; *Société des Acadiens*, *supra* note 9; *Bilodeau*, *supra* note 9.

53. The majority’s reasoning in these cases have been thoroughly criticized (and essentially overturned), and I will not rehearse the litany of problems with it here. See generally *Beaulac*, *supra* note 16; Denise Réaume, “Demise of the Political Compromise Doctrine: Have Official Language Use Rights Been Revived?” (2001) 47 McGill LJ 593.

54. See *MacDonald*, *supra* note 9, Wilson J, dissenting. In fact, it is impossible to neatly distinguish between Justice Wilson’s reading and the majority’s reading on the basis of their relative “breadth.” While it is true that the rights of a private party were defined more narrowly by the majority than by Justice Wilson, the rights at issue were extended to a larger number of people, given that, under Justice Wilson’s interpretation, representatives of the state, including judges, would have been excluded from any protections, as the state would have been held to be the subject of the guarantees at issue. One could therefore plausibly argue that both readings are “broad” or “narrow” depending on one’s frame of reference.

purpose of these measures was simply to prevent the state from prohibiting the use of English or French in a judicial context, something which had been attempted under the *Act of Union, 1840*, the immediate predecessor to the *Constitution Act, 1867*, as well as in the first version of Quebec's *Charter of the French Language*.⁵⁵ For Justice Wilson, by contrast,⁵⁶ the purpose was rather to ensure equal access to legislative and judicial institutions for both language groups, meaning that each set of public bodies was required to be able to function in both languages on an institutional level. Later decisions adhere to the same pattern, even if they do (generally) exhibit a richer understanding of the relevant interests than the majority reasons in the Trilogy. For example, while the SCC ultimately overturned the lower courts' holding in *DesRochers* that equality under section 20 of the *Charter* applies only to communication and not to the quality of public services, its reasoning did not rely on the formal–substantive dichotomy, but rather on its conclusions about the purpose of the measures at issue.⁵⁷ Even in *Beaulac*, which explicitly used the vocabulary of “substantive equality,” the Court's ultimate conclusion with respect to interpretation was stated in similar terms: “Language rights must *in all cases* be interpreted purposively.”⁵⁸ It is therefore preferable to focus one's analytical efforts on the broader interpretive matrix of the provision at issue, rather than attempting to shoehorn the issue at hand into the formal–substantive dichotomy.

IV. THE BASIS FOR A UNIFIED THEORY OF LINGUISTIC EQUALITY

Of course, grounding the analysis in the purpose of the specific measure at issue, rather than the (putatively) archetypal formal–substantive dichotomy, might give rise to a different problem. Unlike general equality rights, which are typically

55. *Quebec (AG) v Blaikie et al*, [1979] 2 SCR 1016.

56. Chief Justice Dickson espoused similar views with respect to section 19(2) of the *Charter* (but not section 133 of the *Constitution Act, 1867*). See *Société des Acadiens*, *supra* note 9 at 564–65. For Justice Wilson's view, see *MacDonald*, *supra* note 9 at 537–38.

57. The court effectively held that in cases where, given the nature of the service, sociocultural differences between the two language groups stand to have an impact on service delivery and effectiveness, the minority is entitled to a parallel development and delivery process, as federal institutions have a duty to “take the necessary steps to ensure that *Francophones are considered equal partners with Anglophones*... [in the] definition... and in the provision of equal economic development services.” *DesRochers* SCC, *supra* note 42 at para 28 [emphasis in original]. A policy tailored to the needs of the majority and offered to the minority through bilingual staff and translated materials would likely violate the principle of equality.

58. *Beaulac*, *supra* note 16 at para 25 [emphasis in original].

contained in a single overarching provision, measures protecting linguistic equality are numerous and often quite detailed.⁵⁹ If the axiomatic constraints of an equality guarantee are defined by its specific purpose, then perhaps there is a myriad of distinct conceptions of linguistic equality tied to the particulars of each language rights provision. This in turn could make it impossible to capture them all using a single concept, and therefore doom any attempt to use such a concept as the basis for a general theoretical account.

Fortunately, the case law dealing with the interpretation of language rights suggests that this is a manageable problem. Language rights measures pertaining to English and French have been deemed by the courts to form a unified field for the purposes of interpretation. As a result, the courts have developed a specialized

59. Language rights measures pertaining to English and French are found in a very wide array of legal instruments adopted at both the federal and provincial levels. Strictly speaking, only some of these measures can properly be described as relating to the matter of “official languages” in the constitutional sense: sections 16 to 22 of the *Charter*, the federal *Official Languages Act* (which implements and further specifies the latter), the *Official Languages Act* of New Brunswick (which does the same), as well as the *Official Languages Act* of the Northwest Territories and of Nunavut and the *Languages Act* of the Yukon (which, as creatures of federal statutory law, are likely subject to sections 16 to 22 of the *Charter*). Section 23 of the *Charter*, while obviously connected to sections 16 to 22, does not employ the concept of an “official language” and is placed in a separate part, perhaps because it applies primarily to provinces. Similarly, neither section 133 of the *Constitution Act, 1867*, which regulates the use of English and French before Parliament and federal courts, as well as the Legislature and courts of Quebec, nor section 23 of the *Manitoba Act, 1870*, which extends the same principle to Manitoba, employ the term “official.” In addition to these constitutional or constitutionally mandated measures, a number of important provincial statutes dealing with the relative status and rights of anglophones and francophones have also been enacted, most notably the *French Language Services Act* of Ontario (FLSA) and the *Charter of the French Language* of Quebec (CFL). The former recognizes English and French as “official” languages of Ontario with respect to education and the courts and provides fairly generous rights to francophones with respect to the legislative process, public services, and municipalities. However, unlike the federal *Official Languages Act*, it does not represent an implementation of constitutionally guaranteed rights. The CFL, for its part, declares French to be the sole “official” language of Quebec and generally aims to make it the exclusive language of the provincial state apparatus. However, its effects are limited by the scope of section 133 of the *CA 1867* and section 23 of the *Charter*, and it does recognize a number of language rights for non-francophones, in particular anglophones. Like the FLSA, the CFL is not directly connected to any constitutionally guaranteed language rights (except with respect to its provisions on the language of education, as well as freedom of expression, which one could include under that general rubric). However, as I explain below, the courts have tended to treat all of these instruments (with the exception of the CFL, which is something of an edge case) as belonging to the same general category of measures, despite their apparent diversity.

set of interpretive principles that apply to these rights as a category. These principles do not depart from the standard canons of constitutional or statutory interpretation, but rather stipulate how to populate some of the variables one is required to consider under the latter, such as the purpose of the measure for interpretive ends.⁶⁰ As a result, a single concept of linguistic equality is presumed to underpin all constitutional and statutory provisions dealing with official languages. Legislative measures dealing with language rights are generally to be understood either as instantiations of the general guarantee set out in sections 16(1) and 16(2) of the *Charter* (which provide that English and French shall enjoy “equality of status and equality of rights and privileges” at the federal level and in New Brunswick, respectively) or as an exercise of the power granted by section 16(3) (which authorises Parliament and the provincial legislatures “to advance the equality of status or use of English and French”).⁶¹ In other words, sections 16(1)–(3) of the *Charter* serve as the nexus and fountainhead of what is presumed to be a conceptually coherent scheme embracing both constitutional and statutory law. This scheme extends to language rights granted elsewhere in the Constitution, outside the *Charter*’s section on “official languages” (section 133 of the CA 1867, section 23 of the MA 1870, and section 23 of the *Charter*)⁶² as well as under provincial legislation not directly anchored in any constitutional right.⁶³

60. See e.g. *Charlebois v Saint John (City)*, 2005 SCC 74 at para 23.

61. According to *Beaulac*, language rights must “*in all cases*” be interpreted using the same general principles. *Beaulac*, *supra* note 16 at para 25 [emphasis in original]. This proposition was anchored primarily in sections 16(1) and 16(3) of the *Charter*. Legislative measures dealing with language rights at the federal level are to be understood either as instantiations of the general guarantee set out in section 16(1) (and further specified in sections 17(1), 18(1), 19(1) and 20(1) of the *Charter*) or as an exercise of the legislative authority conferred by subsection 16(3). The same is true of legislation in New Brunswick, which is subject to a parallel scheme set out in sections 16(2), 16.1, 17(2), 18(2), 19(2) and 20(2) of the *Charter*. See *Charlebois v Mowat et ville de Moncton*, 2001 NBCA 117 at paras 62–63 [*Charlebois*].

62. Section 133 of the *Constitution Act 1867*, section 23 of the *Manitoba Act 1870*, and section 23 of the *Charter*, though falling outside the scheme of “official languages” set out in sections 16 to 20 of the *Charter*, have been deemed to rest on the same general principle of linguistic equality as the those in the *Charter*. *Beaulac*, *supra* note 16 at paras 16–24.

63. Legislation conferring language rights in provinces other than New Brunswick is to be viewed as an exercise of the section 16(3) authority, with the exception of matters falling under some other constitutional guarantee, such as section 133 of the *Constitution Act, 1867*; section 23 of the *Manitoba Act, 1870*; and section 23 of the *Charter*. See for example *Lalonde*, *supra* note 2 at paras 128–39 (regarding the *French Language Services Act* of Ontario); *CL v Quebec (Société de l'assurance automobile)*, 2014 QCTA 2386 (Tribunal Administratif du Québec) at paras 28–36 (regarding the *Charter of the French Language*). *Contra* the last decision, see *Odeh v Québec (Ministère de l'Éducation) (Comité d'examen sur la langue d'enseignement)*, 2005 QCCA 670 at para 46 (which held that the principles set out in *Beaulac* do not apply to the *Charter of the French Language*). The latter is thus something of an edge case for the time being.

In light of the presumed conceptual coherence of language rights, developing a unified theory of linguistic equality seems both possible and worthwhile. However, such a theory must be able to accommodate and account for the somewhat complicated structure of the official language rights system. This requires that two points be addressed. First, the content of the central unifying principle needs to be defined. Second, its relationship to the specifics of particular language rights provisions must be clarified. For even if we assume that all language rights measures participate in a general project of linguistic equality, their individual functions will necessarily be limited in scope. We therefore need some way to articulate the specific burden they bear. In order to distinguish between these two levels of analysis, I will refer to them as *generic* and *special* linguistic equality, respectively.

In the balance of this article, I will attempt to articulate the analytical relationship between these two concepts of linguistic equality, as well as propose a preliminary account of the former. My overall approach is heavily inspired by Réaume's account of the analytical structure of general equality rights, with some modifications needed to accommodate the added complexity of the official language rights system. For the sake of clarity, I will begin by summarizing Réaume's account, and then explain how it can be adapted to serve our needs here.

V. THE ANALYTICAL STRUCTURE OF LINGUISTIC EQUALITY

As I noted above, Réaume argues that equality rights do not protect an interest in equality, as such. Instead, they are concerned with protecting some other interest that is presumed to be *distributed* equally.⁶⁴ The point of such rights is not to enforce a rule of egalitarianism for its own sake, but rather to ensure that the interest in the underlying good is respected. While a comparison of the claimant's situation to that of some other group is central to the analytical structure of the right, it functions solely as a means for determining whether (and to what extent) the interest at issue has been infringed.⁶⁵ Thus, on Réaume's account, the true role

64. Réaume, "Dignity, Equality, and Comparison," *supra* note 36 at 8-9.

65. Réaume argues that the remedies typically sought for an equality rights breach make this clear. Claimants in such cases never seek a levelling-down of the entitlement created by the legislation; instead, they ask for a levelling-up, *i.e.*, to be included in a scheme from which, they assert, they have been wrongly excluded. This suggests that the interest that concerns them is not truly based in egalitarianism as a free-standing value. A claim solely predicated on such an interest would be indifferent as between levelling-up and levelling-down, since both would produce "equality" from a conceptual standpoint. The fact that equality rights are not viewed in this way indicates that the underlying value is not egalitarianism as such, and that something else is going on. *Ibid.*

of an equality guarantee is to “police” the distributive functions of the state from the vantage point of this equally distributed interest.⁶⁶

However, this policing function is not operative in all circumstances. Instead, its availability depends on the nature of the contested measure and its relationship to the interest underpinning the equality guarantee. As Réaume points out, most of what the state does is distribute costs and benefits.⁶⁷ Any particular act of distribution by the state, whether in the form of legislation or administrative practice, will be based on criteria which instantiates an underlying principle of distribution, *i.e.*, a principle defining who is entitled to the benefits or can be made to bear the costs. This will typically be done in order to create or secure a particular good in furtherance of some human interest.⁶⁸ Yet a person making an equality claim asserts that a wider distribution of this particular good is required by the equality provision.⁶⁹ Such a claim implies that there is some connection or overlap between the specific human interest advanced by the act of distribution, on the one hand, and the more general interest underpinning the equality guarantee, on the other. More specifically, it implies that the specific distribution at issue is “justiciable” in the name of the underpinning interest.⁷⁰ For example, suppose that the right to equality rests on the premise that all individuals possess equal dignity. Suppose also that some benefits provided by the state, like health care, can be viewed as “dignity-constituting,” in the sense that their purpose is (at least in part) to secure or reflect the inherent dignity of every individual. From that perspective, one could use the principle of equal dignity as a basis for evaluating the state’s distribution of health care benefits.⁷¹ However,

66. *Ibid* at 10-13.

67. As I understand the argument, Réaume takes this to include not only straightforwardly economic costs and benefits, but any form of advantage or disadvantage, including punishment, social status, or autonomy.

68. Réaume, “Dignity, Equality, and Comparison,” *supra* note 34 at 10. Réaume explains that:

We all have an interest in security from physical suffering, both because pain is itself bad and because some forms of suffering can curtail one’s ability to pursue one’s important projects in life, which ability is an independent good. These interests may ground provision of health care based on need or fair access to work opportunities so we can feed and shelter ourselves, and many other concrete goods and benefits besides. Each of these distributive principles is ultimately grounded in the interest in freedom from suffering. That is to say, when these concrete goods are provided, it is because they serve this interest (or one like it).

69. *Ibid* at 11.

70. Réaume goes on to outline some of the reasons why they think the concept of dignity can fulfill this role, given that the dignity interest often plays a role in motivating the state’s choices regarding the distribution of benefits and burdens. *Ibid* at 12-13, 19-21.

71. *Ibid* at 12-13.

benefits that have no relation to human dignity, or principles of distribution that have no effect on it, would not be subject to such review.

Thus, in Réaume's account, a valid equality claim rests on the interaction between two distributive principles, with one (general equality) being used to discipline the other (the contested act of distribution). As I will illustrate below, the basic elements of this account can be repurposed to explain the analytical relationship between generic and special linguistic equality. However, in order to do so, we must add a third component to the analysis, because, unlike general equality rights, which arise from the interaction of two main components (the equality guarantee and the act of distribution), language rights claims involve three components: (1) the principle of generic linguistic equality, (2) the specific language right at issue (which embodies a principle of special linguistic equality), and (3) a further act of distribution, such as a piece of legislation or an instance of administrative practice that is subject to review on the basis of that right. As a result, there are two potential levels of analysis in any given case: (1) the interaction between the particular language right at issue and the contested measure, which involves a claim to special linguistic equality; and (2) the interaction between the general principle of linguistic equality and the proposed definition of the specific right involved, which involves a claim to generic linguistic equality. At the level of special linguistic equality (level 1), a particular language right can be used to "police" the distributive choices of the state from the vantage point of the principle of distribution it is intended to capture, such as linguistic equality in public services (*e.g.*, section 20 of the *Charter*). This must be done while keeping in mind the particular limits on the function of the language right at issue (*i.e.*, the specific subset of interests it is meant to protect). At the same time, any proposed definition of the distributive principle embedded in that right is subject to review on the basis of generic linguistic equality (level 2). Most language rights are broadly worded, and so there is likely to be more than one possible account of the distributive principle instantiated in any given right. The primary role of generic linguistic equality is to guide the choices made in this regard by providing one or more general principles that can discipline the interpretation of particular language rights measures.

The workings of the model I am proposing can be illustrated using the reasons in *Mahe v Alberta*, where the SCC first set out its general interpretive framework for section 23 of the *Charter*.⁷² The specific issue in that case was

72. See *Mahe*, *supra* note 2. For a much more detailed analysis of the conceptual architecture of *Mahe*, see generally Labelle Eastaugh, "The Concept of a Linguistic Community," *supra* note 47.

whether or not section 23 provides parents with a collective right to “management and control” over schools operating under the auspices of that provision.⁷³ In order to answer this question, the Court needed to address the role of equality in defining section 23 rights. But rather than begin its analysis by considering the particulars of the education context, it approached the issue from a much higher level of abstraction and made a number of broad theoretical statements about the purpose of the official language rights system as a whole. For instance, the Court noted that this system was intended to “give effect to the concept of an ‘equal partnership’” between the two language groups,⁷⁴ a partnership which was held to rest on certain basic principles, such as the premise that “any broad guarantee of language rights ... cannot be separated from a concern for the culture associated with the language,” because “[l]anguage is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it.”⁷⁵ Only after having set out these premises (which relate to what I am calling the principles of generic linguistic equality) did the Court define the more specific right to *educational* equality found in section 23, holding that the latter in fact serves to instantiate these broader principles.⁷⁶ This more narrowly tailored concept of equality (which is an instance of special linguistic equality) was then used as the basic frame of reference for interpreting section 23’s history and text,⁷⁷

73. Sub-section 23(3)(b) of the *Charter* confers a right on members of the French or English minority (depending on the province) to have their children receive “instruction in minority language educational facilities.” See *Mahe*, *supra* note 2 at 345. The parents argued that this right to “facilities” included not only a right to separate schools, but also a right to administer these schools collectively through a distinct school board which would enjoy a degree of control over the content of the curriculum. The provincial government, for its part, maintained that section 23 deals merely with language as the medium of instruction, that it imposed no constraints on provincial powers to define the content of the curriculum, and that the word “facilities” denoted nothing more than a separate physical structure and implied no rights over school governance (See *ibid*). See *Mahe*, *supra* note 2

74. *Ibid* at 364.

75. *Ibid* at 362.

76. *Ibid*.

77. *Ibid* at 368-73. Ultimately, the Court held that section 23 does indeed provide parents with a right to management and control, as this was necessary to respect the general principles on which it rests. In particular, such a right is “vital to ensure that [the] language and culture flourish. ... [B]ecause a variety of management issues in education, *e.g.*, curricula, hiring and expenditures, can affect linguistic and cultural concerns,” and “the majority cannot be expected to understand and appreciate all of the diverse ways in which educational practices may influence the language and culture of the minority” (*ibid* at 372).

which in turn was used to police the distributive measure at issue, namely the provisions of the *School Act* that allocated powers over school management.⁷⁸

Distinguishing between these two levels of analysis clarifies the central issues at stake in this case, as well as the extent of the its relevance to other language rights contexts. On one level, the claimants contested the province's narrow interpretation of section 23 rights, on the grounds that it was incompatible with the basic premises of all official language rights. This aspect of the case is primarily concerned with two things: (1) the way in which the overarching relationship between the two language groups—and their relative places in Canadian society—ought to be conceived; and (2) how this relationship should inform our understanding of the interests protected by section 23. Statements made on this level of analysis are thus likely to be applicable to all language rights, as evidenced by the frequency with which the relevant passages from *Mahe* are cited by the courts when dealing with otherwise unrelated provisions.⁷⁹ On a different level, however, the claimants were also contesting the details of the province's school management structure, on the grounds that it was incompatible with their specific interest in educational equality. This claim involved a more detailed consideration of the principles that ought to govern school administration and the specifics of the impugned legislation. Such principles are bound to be more idiosyncratic than those of generic linguistic equality, and so their applicability outside the education context cannot be assumed, even though, as an application of generic linguistic equality, they may nonetheless be relevant. Thus, while the section 23 case law has consistently held that the attainment of educational equality requires the provision of educational services through a distinct set of siloed institutions

78. *School Act*, RSA 1980 ch S-3, as repealed by *School Act*, RSA 2000, c S-3.

79. See e.g. *Beaulac*, *supra* note 16 at paras 18-24; *Lalonde*, *supra* note 2 at paras 134-35; *Charlebois*, *supra* note 61 at paras 28, 50; *Fédération Franco-Ténoise v Canada (AG)*, 2006 NWTSC 20 at paras 112-13 (overturned in part on other grounds in 2008 NWTCA 5). In fact, through *Beaulac*, which immediately became the leading case on language rights interpretation, these aspects of *Mahe* have influenced a whole generation of court rulings.

under the management and control of the language minority (administrative duality), this may or may not be required in other contexts.⁸⁰

VI. GENERIC LINGUISTIC EQUALITY

A. METHODOLOGICAL CHALLENGES

Having described what I take to be the analytical relationship between the concepts of generic and special linguistic equality, there remains of course the question of their substantive content—by which I mean the specific principles of distribution that operate on each level. Defining these principles will be challenging, and not merely because each kind of language right (*e.g.*, education, services, judicial process, employment, et cetera) protects a somewhat different subset of interests. As Réaume has noted, the distributive context in which equality claims are made places the courts in a difficult position. One of the primary aims of democratic governance is to allow the people to deliberate on the distributive principles that should govern state action, and legislators are elected based on their views on such matters. If an equality right were formulated so vaguely as to enable one to challenge any distributive choice, this would require the courts to comprehensively substitute their judgment for that of elected representatives, which they are likely to resist doing.⁸¹ It is therefore imperative to articulate the nature of the distributive principles in a way that is “tolerably plain.”⁸² Accordingly, “[t]he task of a theory of discrimination law, or any other

80. The possibility that such a model may be required is implicit in the SCC’s ruling in *DesRochers* SCC, as well as the Ontario Court of Appeal’s decision in *Lalonde*. See *DesRochers* SCC, *supra* note 42; *Lalonde*, *supra* note 2. In that connection, it is interesting to note that New Brunswick has largely imposed a system of administrative duality on its health care system, while Ontario has incorporated a substantial degree of mandatory francophone participation in the policy development process. For New Brunswick, see *Regional Health Authorities Act*, RSNB 2011, c 217, ss 15-19. For Ontario, see *Ministry of Health and Long-Term Care Act*, RSO 1990, c M.26, s 8.1(2); *Local Health System Integration Act*, SO 2006, c 4, s 16(4)(b); O Reg 515/09; and *Connecting Care Act*, 2019, SO 2019, c 5, Schedule 1, s 44(2)(b). Ontario is in the process of restructuring its health care system but I am aware of no plans to abolish the French-language health planning entities created under the *Local Health System Integration Act*, 2006. For a study of language rights in the Ontario healthcare system, see: Érik Labelle Eastaugh, “L’application de la Loi sur les services en français (LSF) de l’Ontario aux services de santé : la problématique des Réseaux locaux d’intégration des soins de santé (RLISS)” (2019) 49 RGd 357.

81. See Réaume, “Dignity, Equality, and Comparison,” *supra* note 34 at 11-12.

82. *Ibid* at 12.

area of human rights law, is to sketch the process whereby such abstract concepts are brought down to earth in a sufficiently fine-grained way to help decide cases.”⁸³

When attempting to develop a theory that accounts for an existing body of law, one should begin by excavating, and if necessary clarifying, the “patterns of normative understanding” already present in the primary legal sources.⁸⁴ Existing norms and principles must be identified and described, including those that may simply be implicit in the general scheme of legislative action and judicial decision-making. These patterns will supply a number of “fixed points” that define or at least constrain the scope of the legally possible.⁸⁵ However, one must also be mindful that the meaning of juridical concepts depends in part on extra-judicial notions, and that the boundary between legal and moral discourse is somewhat porous.⁸⁶ A complete account of linguistic equality should therefore endeavour to make sense of the moral intuitions reflected in the “patterns of normative understanding,” and to fill any conceptual gaps where issues of fundamental importance are left unresolved. It should, in other words, include an account of why linguistic equality, as a legal norm, is morally justified.

However, as I noted at the outset, my focus here is on developing a model of the patterns expressed in the primary legal sources, as this analytical task takes place prior to a consideration of extra-legal moral concepts. In truth, even this more limited goal is too ambitious to be achieved in a single article, but some progress can be made here. That being said, in the final Part of this article (Part VI, below), I will briefly explore some of the challenges involved in expanding the account to include the question of moral foundations, and will offer some preliminary thoughts on how linguistic equality might relate to other principles of equality recognized in the Constitution.

B. TWO PRINCIPLES OF GENERIC LINGUISTIC EQUALITY

Drawing on the leading cases and related sources (like the reports of the Royal Commission on Bilingualism and Biculturalism), as well as scholarly analysis, I have attempted to formulate a set of distributive principles that describe the content of generic linguistic equality. I will explain these principles below—as well as my reasoning in arriving at them—but I will first summarize all three. My proposal involves two interlocking principles, and one corollary.

83. *Ibid* at 21.

84. McCrudden, *supra* note 19 at 634.

85. See Alexy, *supra* note 21 at 48.

86. Bamforth, *supra* note 23 at 171.

The first principle is *individual linguistic equality*: the state must distribute costs and benefits in a way that respects the right of members of each official language community to pursue their conception of a good life without having to abandon, or be disadvantaged by, their community of origin.

The second principle is *collective linguistic equality*: the state must distribute costs and benefits in a way that respects the right of the two official language communities, understood as collective entities, to exist and flourish.

The *corollary* is the state has a duty to provide somewhat greater benefits, or impose somewhat lower costs, on the French-language community because of the history of unfair treatment it has suffered.

I describe the first two principles as “interlocking” because, as I will explain further below, there is significant evidence that individual linguistic equality depends upon collective linguistic equality. In addition, the corollary interlocks with the first two principles in that it holds true merely to the extent that individuals and communities continue to bear costs resulting from past violations of those principles in the present day.⁸⁷

1. INDIVIDUAL LINGUISTIC EQUALITY

In seeking to uncover the patterns of normative understanding in the official language rights system, the most logical place to start is the work of the Royal Commission on Bilingualism and Biculturalism (the Commission), whose reports established the basic parameters of the post-1969 system of official language rights. These reports have been repeatedly cited by the courts and generally hang in the background of any discussion of the official language rights system, whether or not they are explicitly mentioned. Of particular interest here is the fact that the Commission explored the concept of equality in its famous “blue pages,” which set out a coherent theoretical framework for its constitutional and legislative proposals. This framework is considerably more comprehensive than anything offered by the courts directly and is therefore a useful guide to how the components of the official language rights system fit together.

Two things in particular stand out from the Commission’s views on equality. First, it understood its mandate (and thus the purpose of the measures it would propose) as extending beyond the basic human rights enshrined in the Universal Declaration of Human Rights and the *Canadian Bill of Rights*. Though it believed that a denial of these rights along linguistic lines would constitute a breach of equality and would therefore be wrongful, it noted that this was not a common

87. See e.g. *Association des parents de l'école Rose-des-vents v British Columbia (Education)*, 2015 SCC 21 at para 32 [*Association des parents de l'école Rose-des-vents*].

occurrence in Canada and concluded that its role was to explore how to extend the realm of equality beyond this point.⁸⁸ Second, the Commission felt compelled to examine equality at both an individual and a collective level.⁸⁹

I will return to the Commission's concept of collective linguistic equality in dealing with the second principle. For now, I wish to highlight the way in which it described individual linguistic equality. In the Commission's view, such equality exists only if the individual is "able to find, at all levels of human activity, a setting which will permit [them] to develop, to express [themselves], and to create in accordance with [their] own culture."⁹⁰ Such equality can only be attained if "everybody has the same access to the various benefits of a society without being hindered by [their] cultural identity."⁹¹ According to the Commission, this cannot be achieved through traditional rules of non-discrimination alone. In order to be equal, individuals must have the ability to engage as full members of society without needing to renounce their cultural traits—*i.e.*, without needing to adopt those of another group. This requires that the focus be shifted away from the individual and towards social institutions, as these are the portals through which one enters society and thus mediate one's interactions with it.⁹²

Social relationships, particularly in the world of labour, in consumer life, and in political life, are increasingly shaped by social institutions which, so to speak, interpose themselves between individuals and impose on them a certain pattern of action. Interpersonal and intergroup relations, therefore, are often the result of institutional structures which mesh like the gears of a social mechanism to bring groups into contact.

Thus, in order to be able to engage with society on an equal footing, *i.e.*, without being disadvantaged by their linguistic community of origin, members of each group must have ready access to the institutions of society in their own language.

This *institutional conception* of individual linguistic equality, first articulated by the Commission, is present throughout the case law dealing with language rights. For instance, it appears in Justice Wilson's influential dissenting reasons in the Trilogy, where she argued that the purpose of section 133 of the CA 1867, section 23 of the MA 1870, and section 19 of the *Charter* was to impose an

88. See Canada, Royal Commission on Bilingualism and Biculturalism, *Report of the Royal Commission on Bilingualism and Biculturalism. Book I: The Official Languages* (Queen's Printer, 1967) (A Davidson Dunton & André Laurendeau) at xl [*Report on Bilingualism and Biculturalism*].

89. See *ibid* at xl-xliii.

90. *Ibid* at xli.

91. *Ibid* at xl.

92. *Ibid* at xl-xli.

obligation on the judiciary, as an institution, to ensure that francophones and anglophones could access the courts on an equal footing. It was later adopted by a majority of the SCC in *Beaulac*, which held that, in order to respect the principle of linguistic equality, “the exercise of language rights must not be considered exceptional, or as something in the nature of a request for an accommodation,” but rather the norm.⁹³ One implication of this is that, in circumstances where an institution is required to provide services in both languages, there is an obligation to put in place the “institutional infrastructure” needed to provide both services “on an equal basis,” with no regard to “administrative inconvenience” or cost.⁹⁴

The institutional conception can also be seen at work in the *DesRochers* Court’s rejection of the argument that section 20 of the *Charter* merely protects equality in relation to the “linguistic” aspect of a service, and not its content.⁹⁵ In effect, the Court held that the substantive public good which is the subject of a language right must be provided to the linguistic minority on equal terms with the linguistic majority. As a practical matter, this means that the service provided to the minority cannot be developed simply as a post hoc extension of a chronologically or conceptually prior version of the policy designed using the majority as the paradigm case. In situations where, given the nature of the service, sociocultural differences between the two groups stand to have an impact on service delivery and effectiveness, the minority is entitled to a parallel development and delivery process, as federal institutions have a duty to “‘take the necessary steps to ensure that [f]rancophones are considered equal partners with [a]nglophones’ in the definition and provision of economic development services.”⁹⁶

The institutional conception is also quite clearly present in the case law dealing with education rights. On one level, this is quite obvious: education rights are explicitly designed to impose an obligation to create or redesign institutional structures. However, such a right need not rest on the principle of individual linguistic equality outlined above. Consider for example the views expressed by the United States Supreme Court (USSC) in *Lau v Nichols*.⁹⁷ In that case, the USSC held that 1,800 Chinese-speaking children with little knowledge of English could not be compelled to enroll in an English-only public education system and that some measure of special accommodation—which might include bilingual education—was required. In effect, the US Court stated that these

93. *Beaulac*, *supra* note 16 at para 24.

94. *Ibid* at para 39.

95. *Desrochers* SCC, *supra* note 44. See also note 57.

96. *DesRochers* SCC, *supra* note 42 at para 54.

97. 414 US 563 (1974).

children had a right to minority language education. However, this holding did not rest on the premise that members of the Chinese-American community had a right to have their children educated in their own language rather than English. Instead, it was based on the principle that all children had an equal right to access the public education system provided by the state. Since the system functioned only in English, the children's insufficient knowledge of the latter effectively prevented them from enjoying this public benefit, thus resulting in discrimination along lines of national origin. But while this resulted in a duty to provide Chinese-language instruction, it was merely a transitory obligation to provide the affected children the means to learn sufficient English to gain effective access to the public education system; no free-standing right to cultural security or survival was recognized. Indeed, the USSC never questioned the legitimacy of California's decision to provide public education in English only. The underlying purpose of such a policy—ensuring that members of non-Anglophone cultures eventually enter the English-speaking mainstream and that their cultural and linguistic distinctiveness will gradually dissolve into the American “melting pot”—was tacitly endorsed.⁹⁸ In other words, special accommodation was merely a stepping stone to cultural assimilation, rather than a mechanism for preserving the minority language. This conflicts directly with the principle of individual linguistic equality outlined above, which protects individuals from having to abandon their language. And, as is clear from my earlier discussion of *Mahe*, the courts in Canada understand the purpose of French–English education rights to be the preservation of distinct linguistic communities, not their disappearance.⁹⁹

2. COLLECTIVE LINGUISTIC EQUALITY

The institutional conception of individual linguistic equality naturally leads to a consideration of what one might call the “collective” dimensions of language and culture, which is why the Commission ultimately found these two levels of analysis to be inextricably linked. After analyzing the requirements of individual equality, it concluded that a necessary pre-condition for its achievement was the existence of a “distinct society,” an “autonomous society” or a “complete

98. *Ibid* at 572. As Justice Blackmun noted, “We may only guess as to why [the children] have had no exposure to English in their preschool years. Earlier generations of American ethnic groups have overcome the language barrier by earnest parental endeavor or by the hard fact of being pushed out of the family or community nest and into the realities of broader experience.”

99. For more detail, see Labelle Eastaugh, “The Concept of a Linguistic Community,” *supra* note 47 at 151–55.

society” in which one can operate without needing to abandon one’s language and culture.¹⁰⁰ For the Commission, this was a necessary implication of the institutional conception of individual equality, which is premised on the recognition that individual experiences with respect to language and culture are profoundly shaped by large-scale social structures and phenomena. This way of framing the issue ultimately led the Commission to examine equality from the point of view of linguistic communities.¹⁰¹

While it did not use this precise terminology, it is fair to say that, in the Commission’s view, linguistic communities are collective entities, whose status and flourishing have a substantial influence on individual well-being.¹⁰² Much of its attention in this regard was focused on what we might call the question of “viability.” From an empirical standpoint, the central task that the Commission set for itself was to ascertain whether, and under what conditions, each language might be said to have “the means to live.”¹⁰³ In order for this to be the case, each community must have “the means to progress within its culture and to express that culture”;¹⁰⁴ they must both “feel that as a linguistic and cultural group they share in the direction of economic life”;¹⁰⁵ and, from a political standpoint, they must either have the possibility of choosing their own institutions or of participating fully in making decisions within a shared framework, *i.e.*, they must enjoy an adequate “degree of self-determination.”¹⁰⁶ Perhaps unsurprisingly, the Commission ultimately concluded that the French-language community did not enjoy full equality with its English-language counterpart in most of these respects, and that government action was a significant part of the problem. As a result, its recommendations with respect to “official languages” (*i.e.*, the use and status of each language within public institutions) were largely aimed at correcting this problem.

Now, it bears noting that there has been some controversy over the extent to which the official language rights system protects “collective” rights.¹⁰⁷ For

100. See *Report on Bilingualism and Biculturalism*, *supra* note 85 at xxxiii, xliii.

101. *Ibid* at xliii.

102. Cf. Labelle Eastaugh, “The Concept of a Linguistic Community,” *supra* note 47.

103. *Report on Bilingualism and Biculturalism*, *supra* note 85 at xxix.

104. *Ibid* at xlv.

105. *Ibid* at xlv.

106. *Ibid* at xlv [emphasis removed].

107. Consider the very strong terms in which, prior to *Mahe*, a former Chief Justice of the Quebec Superior Court condemned the notion that section 23 of the *Charter* protects collective rather than individual rights. See *e.g.* *Quebec Association of Protestant School Boards et al v AG of Quebec et al (No 2)* (1982), 140 DLR (3d) 33 (Qc Sup Ct) at 64-65, Deschênes CJSC.

many, the cardinal virtue of the system put in place by the Trudeau government from 1969 to 1982 was its (apparently) exclusive focus on individual rights.¹⁰⁸ Pierre Elliot Trudeau himself was famously hostile to the concept of collective rights, and some have argued that his approach to the language question was well received by the English-Canadian intelligentsia, especially in Ontario, for this very reason.¹⁰⁹ This is arguably reflected in the fact that the *Charter* did not adopt the concept of “biculturalism” used by the Commission, but instead opted to protect only “language” within a framework of “multiculturalism.”¹¹⁰ One might therefore question whether official language rights ought to be viewed as having a collective dimension, despite the Commission’s views on the matter.

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108. Consider for example the following statement by Lloyd Axworthy, a prominent member of the Liberal party and later a leading member of Cabinet, during the debates leading up to the 1988 reform of the *Official Languages Act*:

The Government to which I belonged enacted the Official Languages Act of 1969. At that time, there was a clear distinction made that the protection and enhancement of official languages was in no way a qualification of the multicultural fact of Canada. The two could live side by side because in fact, when talking about language rights, we were talking about individual rights, not group rights. Individual rights are the rights of Canadians. ...

Mistakes are made at times. I refer with some trepidation to the Meech Lake Accord which advances the concept that we are now establishing group rights in Canada, that rights are established according to one’s collectivity, according to the group to which one belongs, not according to the fact that one is an individual who happens to speak French or English. That in itself must be looked at as a trend to be treated with some wariness. As long as we were able to assert the principle of language rights as individual rights it did not damage or begin to infringe upon the concept of cultural rights as we have come to understand them and use them in this country. I believe that has been one of the successful formulas which has resulted in the majority of western Canadians supporting and promoting the enhancement and protection of language rights across Canada as a Canadian issue. If we find ourselves straying from that very successful formula of ensuring individual rights we could be opening up an avenue of further dispute and conflict.

House of Commons Debates, 33-2, vol 11 (7 March 1988) at 13448 (Hon Lloyd Axworthy). See also André Burelle, *Le Mal canadien: essai de diagnostic et esquisse d’une thérapie* (Fides, 1995) at 65. See also Pierre Elliott Trudeau, “La nouvelle trahison des clercs,” *Cité libre* 13:46 (April 1962) 3. For a more recent flare-up of this debate, consider the resignation of a leading member of cabinet over the Quebec “nationhood” resolution in 2006. “Tory Cabinet Minister Quits Post over Motion,” (27 November 2006) online: *CBC News* <www.cbc.ca/news/canada/tory-cabinet-minister-quits-post-over-motion-1.585951> [<https://perma.cc/5F9F-TQD2>].

109. Kenneth McRoberts, “Making Canada Bilingual: Illusions and Delusions of Federal Language Policy” in David P Shugarman, Reginald Whitaker and Donald V Smiley (eds), *Federalism and Political Community: Essays in Honour of Donald Smiley* (Broadview Press, 1989) 161.
110. *Ibid* at 184. See also Russell, *supra* note 7 at 342.

On the other hand, the courts have repeatedly relied on a number of semi-theoretical statements that clearly hearken back to (and sometimes directly quote) the framework developed by the Commission, such as the proposition that “any broad guarantee of language rights ... cannot be separated from a concern for the culture associated with the language”;¹¹¹ that “language is ... a means by which a people may express its cultural identity”;¹¹² that language rights support official language “communities” and their “culture”;¹¹³ and that individual language rights are justified by the existence of the community.¹¹⁴ As a general matter, terms like “community” and “people” spontaneously bring to mind something that is “qualitatively different” from a mere collection of individuals,¹¹⁵ and it is therefore no surprise that these statements have been used to support the recognition of what the courts have explicitly described as “collective rights.”¹¹⁶

The precise extent to which official language rights are collective rights is a complex topic in its own right, which I have explored at some length elsewhere. Suffice it to say here that, in my view, the case law is best read as conceptualizing the body of language rights-holders—often referred to by the term “linguistic community”¹¹⁷—as a collective entity, with interests that are distinct from, and non-reducible to, the interests of its individual members.¹¹⁸ If this view is correct, it implies that the courts view generic linguistic equality as having a collective dimension. It therefore calls for comparisons between individuals *and* between linguistic communities as collective entities in appropriate circumstances.

111. *Mahe*, *supra* note 2 at 362.

112. *Ford v Quebec (AG)*, [1988] 2 SCR 712 at 748-49 [*Ford*].

113. *Beaulac*, *supra* note 16 at para 17. See also *Association des parents de l'école Rose-des-vents*, *supra* note 84 at para 26; *Lalonde*, *supra* note 2.

114. *Beaulac*, *supra* note 16 at para 20.

115. See *Dunmore v Ontario (AG)*, 2001 SCC 94 at para 17 [*Dunmore*]. Consider the following remarks by Justice Bastarache on behalf of the majority in *Dunmore* in relation to s 2(d) of the *Charter*:

As I see it, the very notion of “association” recognizes the qualitative differences between individuals and collectivities. It recognizes that the press differs qualitatively from the journalist, the language community from the language speaker, the union from the worker. In all cases, the community assumes a life of its own and develops needs and priorities that differ from those of its individual members. Thus, for example, a language community cannot be nurtured if the law protects only the individual's right to speak.

116. See *Arsenault-Cameron v Prince Edward Island*, 2000 SCC 1 at para 29.

117. See *e.g. Charter*, *supra* note 1 at section 16.1; *Official Languages Act*, *supra* note 19 at section 41.

118. See generally Labelle Eastaugh, “The Concept of a Linguistic Community,” *supra* note 47.

3. LIMITS

I wish to be clear that what I have outlined above is a possible *description* of the normative patterns already present in authoritative sources, and not a justification. It is also an *incomplete* description, for I have offered no clear explanation of what might count as a relevant cost or benefit in the context of these distributive principles. Even assuming that my proposal is correct, further work will be necessary to develop this aspect of it, as well as to determine how, or even whether such principles can be justified from a moral standpoint. This further effort may in fact demonstrate that it is possible to generate a single principle, analogous to the concept of equality of dignity, that exists at a higher level of abstraction and that both explains and justifies the principles outlined above.¹¹⁹ Conversely, it may demonstrate the impossibility of folding both principles into a unified and coherent normative framework, which might suggest that the law—or at least its internal account of itself—needs to change. Ultimately, a plausible attempt on either score will require a more comprehensive account than I have offered here.

C. WHITHER “SUBSTANTIVE” EQUALITY?

One final comment before concluding on this point. Given that the “substantive” character of linguistic equality was asserted with such force in *Beaulac* and in the case law since then, the reader may reasonably wonder what we are to make of this notion under my account. Must it be completely jettisoned? I do not believe so.

As I noted above, such a distinction, to the extent that it has any content, will be parasitic upon the underlying axiomatic constraints that define the purpose of an equality guarantee. It therefore cannot form the basis for a genuine account of the right. However, if one has a good grasp of those constraints, it may be possible and even helpful to articulate a schematic binary of that kind to serve as a heuristic in future cases. In light of the principles outlined above, I believe there is in fact a way of framing this dichotomy in a manner that captures the general pattern of decisions viewed as either “narrow” or “generous.”

In my view, a proposed interpretation of a right that conceives English or French merely as *abstract codes* can be thought of as a “narrow” or “formal” conception. By contrast, a conception of the right that views them as being, in addition to codes, social phenomena capable of affecting access to public services and the distributive effects of government policy (amongst other things), can be thought of as a “broad” or “substantive” one. My proposal stems from the observation that any natural language is *both* a code and a social phenomenon.

119. Doucet, “L’égalité dans *Lalonde et al c Commission*,” *supra* note 29 at 276.

As a code, a language is an abstract set of symbols created for the purposes of satisfying the “technical requirements of communication,”¹²⁰ *i.e.*, storing or transmitting information. However, one can use a code without any guarantee of being understood by another person. Actual understanding, by contrast, is an emergent property of a *social relation* between a speaker and a listener, both of whom must comprehend the code being used as well as the nature and context of the communicative activity in which they are engaged. Accordingly, any reference to a particular language in a constitutional or statutory text can be taken to designate either a code *simpliciter*, or a complex cluster, or social relations centered on that code.

This framing captures what I believe to be the underlying division between those decisions that have come to be viewed as narrow, formal, and therefore illegitimate, and those that instead seek to “breath life” into the relevant language right.¹²¹ Consider the Trilogy. Since there can be no communication without comprehension, conceptualizing English or French as a “means of communication,” as Justice Wilson did, is in fact to view them as social phenomena, for it interprets them as denoting a particular kind of social relation. It is thus a “substantive” reading under this formulation of the dichotomy. By contrast, holding that the right to receive services in either English or French includes only the right to have that language be used as the vehicle for delivery—as the lower courts did in *DesRochers*, and as the province argued in *Mahe*—is to conceive of them merely as codes, for it overlooks the fact that each language represents a pattern of social relations with the potential to alter access to, or benefit from, the service at issue.

The fact that apparently identical approaches—*i.e.*, treating English and French as “means of communication”—can be construed so differently is in fact implicit in the institutional conception of linguistic equality. The latter holds that the nature of the protected interest must be understood within the broader context of the institutional setting in which the right is meant to operate (meaning, for example, that one would have to consider the general purpose of the service being offered, as the SCC held in *DesRochers*).¹²² Since a judicial proceeding is, fundamentally, an extended exercise in communication, it is perfectly reasonable that this would be the social relation of central interest. Other public institutions, however, while often *depending* on communication to function, frequently aim to provide other goods. The institutional conception of linguistic equality holds that such goods must be distributed with regard to a wider range of social relations.

120. Cf Pierre Bourdieu, *Langage et pouvoir symbolique* (Fayard, 2001) at 74.

121. See *Mahe*, *supra* note 2 at 365.

122. *DesRochers* SCC, *supra* note 42 at para 51.

Of course, as I pointed out earlier, sometimes formal equality is the primary concern. A government institution that lacks any ability to use the required language can be a serious problem, even if this is simply a breach of “formal” linguistic equality. My distinction is therefore not intended to minimize the importance of such failures, which sadly remain all too common, but rather to highlight that this is but a small portion of what linguistic equality is meant to protect. To that extent, it can be used as an aid in thinking through the possible interpretations of a given language right.

VII. LINGUISTIC EQUALITY AND THE CONSTITUTION

Having laid the foundations for a preliminary account of linguistic equality, what can we say about its relationship to other forms of equality recognized by the Constitution? At the very least, there is reason to think that both linguistic and general equality rights may have a common parentage. Both the Commission reports and the case law view language rights as having a link to general equality. The Commission thought of linguistic equality as resting on roughly the same foundations as general equality (individual autonomy and dignity) and understood the project of “biculturalism” as an attempt to more fully realize those principles, not compete with them. And although the case law distinguishes between general equality rights and language rights as a matter of law, it nonetheless sees them as inhabiting a conceptual continuum of sorts. For instance, in *Beaulac*, the SCC held that equality in a language rights context must be viewed as “substantive” equality, as this is *the* norm applicable under Canadian law, noting that “[e]quality does not have a lesser meaning in matters of language.”¹²³ What this implies about the protected interests is unclear, but it does speak to the belief that there exists a continuity between the two concepts, suggesting that the values underpinning general equality may play a role in accounting for official language rights.

At the same time, there is no escaping the fact that, as a matter of constitutional law, linguistic equality currently protects only two communities. It might therefore be read as creating a hierarchy amongst languages or cultures. In this connection, it is interesting to note that the concept of “biculturalism” was reintroduced by the courts as a framework for interpreting language rights, even though the Pierre Elliot Trudeau government deliberately set it aside in favour

123. *Beaulac*, *supra* note 16 at para 22. The SCC has also conflated language rights with general non-discrimination rights in other contexts. See *e.g.* *Thibodeau v Air Canada*, 2014 SCC 67.

of “multiculturalism.”¹²⁴ Does this imply that general and linguistic equality are in conflict, and that the latter is an exception to the former? And if so, does that count as a reason against the current official language rights system?

As I see it, there are least two strategies one might adopt in attempting to respond to these concerns. On the one hand, one could argue that both forms of equality are grounded in the same principles and protect the same interests, and that the current edifice of rights is merely incomplete. In other words, official language rights only *appear* to single out two languages for special treatment because they are more detailed than general equality rights. On this account, the greater specificity of official language rights merely reflects a consensus that such rights are warranted and workable in the case of English and French, without excluding the possibility that they also exist for other languages. Additional sociocultural groups may enjoy the same rights, provided that the case can be made that they are required in light of their particular circumstances.¹²⁵ Of course, there might be some limits as to how far one could take such reasoning, at least from a legal perspective, since an argument of this kind, even if anchored in section 15 of the *Charter*, could do nothing to alter the “official” status of English and French, which is constitutionally entrenched. However, it is unclear whether “official” status has any practical effect separable from the operative terms of section 16(1).¹²⁶ If it does not—that is, if it is merely symbolic—then this would leave open the possibility of inferring the full range of protections currently afforded English and French from a principle of general equality.

A different approach would be to acknowledge that official language rights are an exception to general equality, but that this special treatment is justified. For example, one might argue that rights can be “group-differentiated,” to borrow Will Kymlicka’s terminology, and need not be universal. The first step here would be to acknowledge that legal rights can be justified in different ways, and that a legal right can be morally justified without necessarily corresponding to a universal moral right.¹²⁷ David Miller, for instance, has identified three primary types of legal rights, which are distinguished by the nature of their justification:

124. See e.g. *Association des parents de l'école Rose-des-vents*, *supra* note 84 at para 25. Before the SCC’s ruling in *Mahe*, this had led some lower courts to read language rights more restrictively. See e.g. *Reference re Public Schools Act (Manitoba)* (s 79(3), 4, 7), [1990] 2 WWR 289 (Man CA).

125. See e.g. Green, *supra* note 13 at 666.

126. Consider Justice Wilson’s analysis of section 16(1) of the *Charter* in *Société des Acadiens*. See *Société des Acadiens*, *supra* note 9 at 618-19.

127. David Miller, “Group Rights, Human Rights and Citizenship” (2002) 10 Eur J Phil 178 at 181.

(1) human rights, (2) justified legal rights, and (3) citizenship rights.¹²⁸ Human rights are “grounded in features of personhood that human beings everywhere share ... such as personal security, freedom of thought and bodily movement, and so forth.”¹²⁹ Justified legal rights, by contrast, are legal rights granted on the basis of some policy consideration, which may be nothing more than a balance of interests, rather than a moral right.¹³⁰ Finally, citizenship rights are rights that flow from membership in a specific political community. Within that community they can be viewed as morally fundamental, but their content and configuration will be determined by the terms on which that community is founded.¹³¹

The concept of citizenship rights, or something like it, offers a means of explaining why it is that specific cultural communities can claim particular rights vis-à-vis their own states that may not correspond to any universal right. The notion captures a widely shared intuition that some portion of the content of political morality is necessarily local in origin, and shaped by the distinctive historical experience of each particular society.¹³² As a result, the circumstances of history can justify the provision of certain goods on a limited basis that otherwise might appear discriminatory. For example, one can justify financial transfers to African Americans as a response to the legacy of slavery, even though other individuals or groups being left out are similarly situated from an economic standpoint. Perhaps the legitimacy of linguistic equality flows from the broader

128. *Ibid.*

129. *Ibid.* at 181-82.

130. For a similar distinction between what he calls “social human rights” and “social citizenship rights,” see Jeff King, *Judging Social Rights* (Cambridge University Press, 2012) 18-19.

131. Miller, *supra* note 123 at 182. On this point, consider the concurring reasons of Justice Wilson in *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 [*Re BC Motor Vehicle Act*] (discussing the meaning of “principles of fundamental justice,” Justice Wilson notes that “[w]e know what ‘fundamental principles’ are. They are the basic, bedrock principles that underpin a system” at para 122).

132. See e.g. Green, *supra* note 13 at 664-65; Patten, *supra* note 14 at 247. See also Cardinal, *supra* note 14 at 222-23; Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press, 1995) 116-120; Doucet, “Langue mérite-t-elle une protection?” *supra* note 17 at 62. In this connection, consider Joseph Carens’ concept of justice as “even-handedness.” Joseph H Carens, *Culture, Citizenship, and Community: A Contextual Exploration of Justice as Evenhandedness* (Oxford University Press, 2000) at 3. Jacob Levy makes a similar point when he notes that “a state’s avowed self-understanding acquires normative force of its own.” Jacob T Levy, “Language Rights, Literacy, and the Modern State” in Will Kymlicka & Alan Patten, eds, *Language rights and political theory* (Oxford University Press, 2003) 247. See also Stephen Tierney, “Reflections on the Evolution of Language Rights” in André Braën, Pierre Foucher & Yves Le Bouthillier, eds, *Langues, Constitutionalism and Minorities/Langues, constitutionnalisme et minorité* (LexisNexis Butterworths, 2006) 10 at 10-11.

matrix of political values that, as a result of historical experience, have come to govern our sense of constitutional justice.

One advantage of this approach is that it can account for what appear to be inconsistencies in the SCC's approach to interpreting language rights without needing to jettison a major strand of judicial thinking. For many years, the case law was divided between the "political compromise doctrine" adopted in the *Trilogy*,¹³³ according to which language rights are peculiar to Canada and thus non-universal, and the more principled approach followed in the *Reference Re Manitoba Language Rights*,¹³⁴ *Ford*,¹³⁵ *Mahe* and later *Beaulac*. In the *Trilogy*, the Court's thinking was driven by the sense that language rights are contextual in nature, meaning that their justification is derived from a specific set of circumstances, and that to ignore this is to risk doing violence to their democratic legitimacy. This is fair enough, but as the SCC noted in *Mercure*, and as it stated even more unequivocally in the *Secession Reference*, it need not imply that language rights are not principled in nature, and thus non-*seminal*, lesser rights.¹³⁶ Viewing them as fundamental citizenship rights enables one to reconcile both intuitions, for, as others have already argued,¹³⁷ being born of "compromise" does not make it impossible for a constitutional provision to have a principled basis. Sometimes, the very subject matter of a compromise is the adoption of a principle.

I cannot explore these issues any further here. However, it is worth noting that the extent to which the two approaches outlined above ultimately differ is somewhat unclear, given that many leading accounts of group differentiated rights can be reformulated in terms of general equality. Such accounts typically assert, either implicitly or explicitly, that language or cultural rights are justified as the means to secure equality in the distribution of, or access to, some fundamental good. For example, Kymlicka's well-known account is ultimately based on an argument that individuals have a right to equality of autonomy, which as a practical matter requires that the state offer some protection and support to the cultural structures within which autonomy is exercised.¹³⁸ Similarly, the argument developed by Green and Réaume can be seen as resting on the premise that there is a right to equality of linguistic security.¹³⁹ Alan Patten's most recent account

133. See *MacDonald*, *supra* note 9; *Société des Acadiens*, *supra* note 9; *Bilodeau*, *supra* note 9.

134. [1985] 1 SCR 721.

135. *Supra* note 108.

136. *Mercure*, *supra* note 9 at 268; *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 80.

137. See generally Green & Réaume, "Second-Class Rights," *supra* note 13.

138. Kymlicka, *supra* note 129.

139. Réaume, "The Constitutional Protection of Language," *supra* note 14; Green, *supra* note 13; Green & Réaume, "Second-Class Rights" *supra* note 13.

is even more explicit, as he frames his argument as being premised on a right to equal recognition.¹⁴⁰ Thus, it may be that even a “group-differentiated rights” account of linguistic equality would resolve, at a high level of abstraction, into a claim based in a principle of general equality.

140. Patten, *supra* note 18.